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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

WILLIAM CHARLES JANSEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

OPINIONS BELOW

No opinions were delivered or reported by any of the Courts below.

JURISDICTION

The judgment of the Circuit Court of Fauquier County, Virginia was rendered on the 3rd day of December, 1974 (App. A). A Petition for a Writ of

Error was rejected and refused by the Supreme Court of Virginia on the 27th day of August, 1975 (App. B). A Petition for Rehearing was denied by the Supreme Court of Virginia on the 5th day of September, 1975 (App. C). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

Is an affidavit which omits altogether to state the time of the occurrence of the facts relied upon sufficient to show probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

On December 3, 1974 William Charles Jansen was convicted after a jury trial of knowingly possessing with intent to distribute tetrohydrocannabinols in violation of the Code of Virginia. The Petitioner received a sentence of fifteen years in the penitentiary and a fine of Twenty-Five Thousand Dollars ($25,000.00).

On the 26th day of February, 1974 R.O. Jacobson, an investigator with the Virginia State Police, filed an affidavit for a search warrant with a Deputy Clerk of the Fauquier County General District Court. Based on said affidavit, the Deputy Clerk issued a search warrant. Under the authority of the search warrant, a search of a two story log dwelling in Fauquier County, Virginia was made. The officers seized over one hundred (100) pounds of marijuana containing tetrohydrocannabinols and two scales. The affidavit in question is reproduced in full as Appendix D. The Petitioner filed a motion to suppress the evidence obtained pursuant to the search warrant specifically stating his grounds that the affidavit did not state the time of the occurrence of the facts relied upon and, therefore, was without probable cause for the issuance of a search warrant. After argument on August 14, 1974, the trial court took the matter under advisement and, as requested, counsel submitted authorities in support of their positions.

On October 4, 1974, just prior to the jury trial of this case, the trial court orally denied the defendant's motion to suppress evidence obtained from the search of the log cabin (Tr. Oct. 4, P. 2-3).

During the trial of this case, three Arlington County Narcotics Detectives and one Virginia State Trooper testified in detail to the search and seizure of the

marijuana and scales located at the cabin. In addition, a state fingerprint expert and a state chemist exhibited and displayed to the jury the marijuana and scales seized at the log cabin.

After the Commonwealth had presented all of its evidence, the trial court excluded all of the evidence obtained at the search of the log cabin, apparently on the ground that the Commonwealth did not prove that this evidence was the same evidence in the possession of the defendant (Tr. Oct. 7, P. 301, 302). The court instructed the jury not to consider as evidence the marijuana and scales seized at the log cabin (Tr. Oct. 7, P. 321, 322).

After the jury verdict, on November 5, 1974, the trial court again denied the defendant's motion to set aside the jury verdict based on the illegal search warrant used to search the log cabin. The Petitioner, having no right of appeal in the Commonwealth of Virginia, petitioned the Supreme Court of Virginia for a Writ of Error citing as error the trial court's failure to suppress the evidence obtained in the search of the log cabin. Said Petition was denied and rejected by the Supreme Court of Virginia.

ARGUMENT

In this case a State court in the Commonwealth of Virginia has ruled that it is not necessary in an affidavit in support of the issuance of a search warrant to state the time of the occurrence of the facts relied upon to show probable cause for the issuance of a search warrant. This ruling is not in accord with the decisions

of the Supreme Court of the United States. This ruling is not in accord with the decisions of the vast majority of the State courts in this country. See Annot., *Search Warrant: Sufficiency of Showing as to Time of Occurrence of Facts Relied On.* 100 A.L.R. 2d 525 (1965). Since 1932, in the case of *Sgro v. United States,* 287 U.S. 206, the rule has been that the proof of probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time.

In *Aguilar v. State of Texas,* 378 U.S. 108 at page 110 the Court stated:

> "In *Ker v. California,* 378 U.S. 23, 83 S.Ct. 1623, 10 L. Ed. 2d 726, we held that the Fourth 'Amendments proscriptions are enforced against the State through the Fourteenth Amendment,' and that 'the standard of reasonableness is the same under the Fourth and Fourteenth Amendments.' Id., 374 U.S. at 33, 83 S.Ct. at 1630. Although *Ker* involved a search without a warrant, that case must certainly be read as holding that the standard for obtaining a search warrant is likewise 'the same under the Fourth and Fourteenth Amendments.' "

The Supreme Court of Virginia has held that the Virginia Statute controlling the issuance of search warrants are in substance the same as those contained in the Fourth Amendment. *Kirby v. Commonwealth,* 209 Va. 806, 167 S.E.2d 411 (1969) The Virginia Supreme Court has also stated that although the Virginia Statutes fixed no maximum time interval between the date of the events and circumstances recited in the affidavit and the date of the affidavit and

issuance of the warrant, the proof required must be proof of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. *Huff v. Commonwealth*, 213 Va. 710, 194 S.E.2d 690 (1973)

The Commonwealth of Virginia, and your Petitioner believes many other states for various economic and political reasons, authorize many persons without legal training or required training of any sort to issue search warrants. As in this case, the Deputy Clerk of the General District Court of Fauquier County had no legal education and she did not review any of the cases involving searches and seizures, and basically had no standards except her own personal opinion to determine whether or not to issue a search warrant. (Tr. May 9, P. 25-35)

The issuing officer or magistrate or whomever is authorized to issue search warrants is the primary protector of the citizen against unconstitutional envasions of their right of privacy. His job is made even more difficult because the proceeding to obtain a search warrant is invariably an ex-parte proceeding. The magistrate is required to be neutral and detached in making his decision as to whether or not probable cause exists for the issuance of a search warrant. This is a discretionary decision and can only be made when sufficient facts are presented to the issuing officer. The recent rulings of this Court allow the police to present hearsay declarations, see *United States v. Ventresca*, 380 U.S. 102, and also to utilize information from unnamed informants, *Spinelli v. United States*, 393 U.S. 410 in acquiring search warrants. These decisions make it more difficult for the issuing officer to make a

determination as to the validity of the facts presented and more difficult to protect the citizens from the actions of police officers who, because of their partisanship, sometimes have difficulty being impartial in their cause.

One of the problems confronting the issuing officer is what facts amount to a clear and definite statement as to the time of the occurrence of the events relied upon to show probable cause for the issuance of the search warrant. The recent decisions in this regard by many courts have given the police the opportunity to cleverly draw affidavit without giving a definite statement as to the date of the occurrence of the events relied upon. These affidavits are, in effect, circumventing the requirements of the Fourth Amendment of the Constitution of the United States. As the Court said in *Durham v. United States,* 403 F.2d 190, note 6 (9th Cir. 1968):

> "The length of time lapse alone is not controlling since even a brief delay may preclude an inference of probable cause in some circumstances while in others a relatively long delay may not do so."

However, a definite statement of the time when the events occur is needed in an affidavit so that the magistrate can make a determination on facts, not on loose, vague or doubtful statements of time in the affidavit.

Some of the more common substitutes for a definite time and date as used in affidavits are "recently," "within the last few days," "within the last thirty days," "on many occasions," "subsequent dates," and even a statement that an offense is being committed in the present tense has been held to be a sufficient statement of time. Annot., *Search Warrant: Sufficiency*

of Showing as to Time of Occurrence of Facts Relied On. 100 A.L.R. 2d 525 (1965) A typical affidavit that has been held to sufficiently set forth the time of the occurrence of the facts relied upon is set out in full in the Virginia case of *Huff v. Commonwealth*, 213 Va. 710, 194 S.E.2d 690 (1973). This nine paragraph affidavit, without ever giving an exact date or time of any of the facts alleged uses the following terminology, "over a long period of time," "this continuing investigation," "the frequent recurrence," "that in recent weeks," "on certain nights," and "that on a recent date."

The Petitioner believes that the facts and circumstances of this case would give the Supreme Court of the United States an opportunity to rule that a definite statement as to the date of the occurrence of the events relied upon is necessary to show probable cause for the issuance of a search warrant. As the law now stands, there are no clear cut decisions as to what is considered a sufficient statement as to time. There should be a more definite decision in regard to a time element to both aid the issuing officers and to protect citizens from overzealous officials.

In this case, the affiant's mere belief that marijuana is currently being stored on the premises of the log cabin is a mere conclusion and is not a sufficient statement of fact in regard to time to support probable cause for the issuance of the search warrant in question. *Nathanson v. United States*, 290 U.S. 41. It is clear that the evidence obtained as a result of the illegal search warrant should have been suppressed and the failure to suppress this evidence has prejudiced the Petitioner in the trial of his case.

CONCLUSION

For the reasons stated, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

LOWRY J. MILLER
Miller, Miller, Patterson
& Reese
2701 North Pershing Drive
Arlington, Virginia 22201

Counsel for Petitioner

APPENDIX A

VIRGINIA

IN THE CIRCUIT COURT OF FAUQUIER COUNTY

COMMONWEALTH OF VIRGINIA

V.

WILLIAM CHARLES JANSEN

Defendant

ORDER

This 5th day of November 1974 came the defendant, William Charles Jansen, in person and by counsel, pursuant to the motion heretofore filed to set aside the jury verdict and also appeared John W. Wine, Special Prosecutor; and was argued by counsel.

And it appearing to the Court for the reasons stated by the Court on this date, the reasons set forth in the Commonwealth's reply to the motion to set aside the verdict and the reasons stated previously during the trial of this cause that the verdict of the jury was right and proper and that the defendant's motion should be denied on all points; it is therefore

ADJUDGED and ORDERED that the defendant's motion to set aside the jury verdict shall be, and it hereby is, denied; and

It being further demanded of the defendant if anything for himself he had or knew to say why judgment should not be pronounced against him according to law, and nothing being offered or alleged

in delay of judgment thereof, and the defendant having stated that he was fully satisfied with the representation given him by his attorney, it is accordingly the judgment of this Court that the defendant be, and he hereby is, sentenced to confinement in the Penitentiary of this Commonwealth for a term of fifteen (15) years and that he be amerced a fine of $25,000.00 to the use of the Commonwealth and that the Commonwealth of Virginia recover against the defendant its cost by it about its prosecution in its behalf expended in the total of $789.50, which amount includes an allowance of $38.00 to the Court Reporter for the operation of the Court machine.

And it having been represented to the Court that the defendant was subject to a six year penitentiary sentence imposed in the Circuit Court of Arlington County, the Court doth order that six years of the sentence heretofore pronounced against the defendant this day shall run concurrently with the six year penitentiary sentence imposed in the Circuit Court of Arlington County.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

Upon motion of counsel for the defendant, the Court directs the Clerk of this Court to forward to defendant's counsel copies of a transcript of all proceedings had in this cause, the defendant's counsel having represented to the Court that he was desirous of prefecting an appeal on behalf of his client.

And the defendant is remanded to the custody of the jailor of this Court to be returned to the authorities of

the Arlington County Jail forthwith, wherein he is being held for the authorities of the penitentiary.

The Clerk of the Court is directed to forward a copy of this Order to the Jailor of this Court, to the Jailor of Arlington County, to the Superintendent of the Penitentiary, 500 Spring Street, Richmond, Virginia; and to the Special Prosecutors and the Attorney for the Defendant.

Enter this 3d day of Dec. 1974.

Raynard V. Snead
JUDGE

A copy,
Teste: H.L. Pearson, Clerk
By Deputy Clerk

John W. Wine
Special Prosecutor

APPENDIX B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday *the* 27th *day of* August, 1975.

The petition of William Charles Jansen for a writ of error and supersedeas to a judgment rendered by the Circuit Court of Fauquier County on the 3rd day of December, 1974, in a prosecution by the Commonwealth against the said petitioner for a felony, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that there is no reversible error in the judgment complained of, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said circuit court.

A Copy,

Record No. 750242

Teste:

Howard G. Turner, Clerk

By: /s/ Allen L. Lucy
Deputy Clerk

APPENDIX C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 5th *day of* September, 1975.

William Charles Jansen, Plaintiff in error,

against Record No. 750242

Commonwealth of Virginia, Defendant in error.

Upon a Petition for Rehearing

On mature consideration of the petition of the plaintiff in error to set aside the judgment rendered herein on the 27th day of August, 1975, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste: [illegible]

Clerk

APPENDIX D

Affidavit for Search Warrant
(Rule 3A:27)

State of Virginia
County of Fauquier

Before me, the undersigned, this day came R.O. Jacobson, Investigator Virginia State Police
who, after being duly sworn, made oath that:

(1) He has reason to believe that on the premises known as (See attached affidavit sheets) in the county (city) of (See attached affidavit sheets) there is now being concealed certain property, namely (See attached affidavit sheets).

(2) He bases his belief that such property can be found on those premises on the following facts:

See attached affidavit sheets

*(3)(a) He has personal knowledge of the fact set forth in paragraph (2).

or

*(3)(b) He was advised of the facts set forth in paragraph (2) by an informer. This informer's credibility or the reliability of the information may be adjudged by the following facts:

See attached affidavit sheets

(4)(a) The offense in relation to which the search is to be made is:

See attached affidavit sheets

(4)(b) The grounds for search and seizure are established by the following facts:**

See attached affidavit sheets

*(5)(a) He has personal knowledge of the facts set forth in paragraph (4).

or

*(5)(b) He was advised of the facts set forth in paragraph (4) by an informer. This informer's credibility or the reliability may be adjudged by the following facts:

See attached affidavit sheets

/s/ R.O. Jacobson
(Signature of Affiant)

State Police Investigator
(Official Title, if any)

Subscribed and sworn to before me on February 26th 1974.

Time: 8:10 P.M.

/s/ Helen [illegible] Young, Deputy Clerk
(Signature and Title)

*If subparagraph (a) is applicable, strike out subparagraph (b). If subparagraph (b) is applicable, strike out subparagraph (a) and set forth the relevant facts in the space provided in subparagraph (b). The informer need not be identified.

**Give reasons why the property should be searched for and seized. If the property to be searched for is contraband, a description of the property will suffice. If the property to be searched for was an instrumentality of a crime or was stolen or embezzled, set forth facts showing probable cause to believe that the property was an instrumentality of a crime or was stolen or

embezzled. If the property to be searched for is property that was used or is being used in committing a crime, set forth facts showing probable cause to believe the property was used or is being used to commit a crime. If the property to be searched for is property constituting evidence of a crime or evidence that a particular person committed a crime, set forth facts showing probable cause to believe that seizure of the property will aid in a particular apprehension or conviction.

Affidavit for Search Warrant

(Rule 3A:27)

State of Virginia
County of Fauquier

Before me, the undersigned, this day came Investigator R.O. Jacobson Virginia State Police who, after being duly sworn, made oath that:

(1) He has reason to believe that on the premises known as a two story log cabin dwelling located approximately 300 feet off of State Route 731 in Fauquier County, Virginia. This dwelling is located 4 3/10 miles from the Marshall, Virginia Post Office. In order to reach this dwelling from the Marshall, Virginia Post Office you travel 2 5/10 miles west on State Route 55, turn right on State Route 677, take the 1st turn on State Route 723 and cross over State Route 55 to the intersection of State Route 731. Turn right on State Route 731 and proceed 3/10 of a mile to the driveway entrance on the right, in the County of Fauquier there is now being concealed certain property, namely marihuana.

(2) He bases his belief that such property can be found on those premises on the following facts:
In Arlington County, Virginia, the Virginia State Police secured a wire tap on a telephone listed to Zellen M. Dempsey (telephone Number 703 979-1432) of 613 S. Quincy Street, Arlington, Virginia. Affiant has been given information from Det. Paul W. Cope #298 Arlington County Police Dept. that one Thomas W. Walsh is a resident of the aforementioned address. Pursuant to an intercepted conversation between the Walsh subject and a subject known only as Eddie to the effect that the Walsh subject was to meet Eddie at a cabin located in Fauquier County, Virginia and that the Walsh subject would pick up a quantity of marihuana and put the aforementioned marihuana in his jeep, and deliver said marihuana to a subject by the name of Leroy, who would be parked in a church lot near the location of the cabin.

As a result of this conversation the jeep was followed and its was observed meeting a white over blue chevrolet with Pennsylvania license plates. These vehicles were followed to a point in Fauquier County, Virginia, at which time they separated and the Walsh jeep was followed to a cabin located near the intersection of State Route 55 and State Route 723 in Fauquier County, Virginia. The Walsh subject was observed leaving his vehicle and going into the cabin. After a short time the Walsh subject was again observed leaving the cabin and getting back into his jeep. Walsh then proceeded to a point on State Route 731 near a white church where he once again met the subject in the white over blue chevrolet. Both vehicles and their drivers drove west on a dirt road into a wooded tract where they remained for approximately fifteen minutes.

Both vehicles then emerged and proceeded east on State Route 731. The Walsh subject, in his jeep, returned to the aforementioned cabin. The subject in the white over blue chevrolet proceeded eastbound on State Route 55 where he was stopped approximately three miles east of Marshall, Virginia by Investigator R.O. Jacobson. Upon stopping this vehicle a quantity of suspect marihuana, in excess of 100 pounds was seized from the vehicle, thus confirming the original wire tap conversation.

/s/ R.O. Jacobson
(Signature of Affiant)
26 February 1974 time 8:10 P.M.

The driver of the vehicle was subsequently arrested and charged with possession of marihuana with the intent to distribute. Trooper L.C. Foster of the Virginia State Police performed a preliminary field test (Valtox) on the suspected marihuana and the results were positive for marihuana.
It is the affiants belief that marihuana is currently being stored on the premises of the aforementioned cabin.

(3)(a) He has personal knowledge of the facts set forth in paragraph (2)

(4)(a) The offense in relation to which the search is to be made is: Marihuana, as listed in Section 54-524.84:4 Schedule 1(d)(10) Code of Virginia, and possessed in violation of Section 54-524.101:1(a) Code of Virginia.

(4)(b) He has personal knowledge of the facts set forth in paragraph (4).

/s/ R.O. Jacobson
(Signature of Affiant)

State Police Investigator
(Official Title, if any)

Subscribed and sworn to before me on 26 February, 1974 Time 8:10 P.M.

/s/ Helen W. Young, Deputy Clerk
(Signature and Title)

General District Court, Fauquier Co.

FILED
FEB 24 1976
R., CLERK

In The

Supreme Court of the United States

October Term, 1975

No. 75-794

WILLIAM CHARLES JANSEN,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

GILBERT W. HAITE
Assistant Attorney General

Supreme Court Building
Richmond, Virginia 23219

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In The

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October Term, 1975

No. 75-794

WILLIAM CHARLES JANSEN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, the Commonwealth of Virginia, respectfully submits the following brief in opposition to the granting of a writ of certiorari in the above matter. The parties will be referred to herein by their respective positions in the state trial court, i.e. defendant and Commonwealth.

QUESTIONS PRESENTED

The Commonwealth would restate the question presented in the following terms:

Did the state trial court commit reversible error in overruling the defendant's motion to suppress certain evidence obtained pursuant to a search and seizure on the grounds

of insufficiency of the affidavit for a search warrant, where the exact same evidence was subsequently suppressed and excluded by the trial court at trial, on other grounds, and not allowed to go before the jury?

The Commonwealth further says the real issue involved in this case, as raised by the defendant in his petition for certiorari, is not even a question of search and seizure but is more appropriately stated as follows:

Did the state trial court commit reversible error in failing to grant the defendant a mistrial after certain evidence had been exhibited in the courtroom in front of the jury when that evidence was subsequently excluded and not allowed to be admitted into evidence?

STATEMENT OF THE CASE

Defendant's statement of the case is substantially correct insofar as it goes and to that extent it is hereby adopted. The Commonwealth would point out the following facts which were also a part of the evidence produced at defendant's state court trial which is the subject of this petition for certiorari.

Through the testimony of Detectives C. Brown, P. Cope, H. Allen, R. Brown, and Troopers J. Lokey, R. Jacobson, and L. Foster, it was established that a meeting took place on February 26, 1974, at a location in Fauquier County, Virginia, between the defendant, a co-defendant, Tom Walsh, and another co-defendant, Samuel Leo Truluck. (Tr. pp. 51-112). This meeting occurred subsequent to arrangements for said meeting having been made by telephone calls between Samuel Leo Truluck and Thomas Walsh, and between Thomas Walsh and an individual identified as Thomas Jenkins, the owner of a certain log cabin located in a remote area of Fauquier County, Virginia. These telephone conversations had been intercepted pursuant

to a legally authorized, court-ordered electronic surveillance conducted by the Virginia Department of State Police on February 25, and February 26, 1974.

Following the initial meeting between Jansen, Walsh, and Truluck, Jansen and Walsh proceeded to the log cabin where they met Jenkins.

Jenkins testified that he had a business arrangement between himself, the defendant Jansen, and Walsh whereby Jenkins was to store large quantities of marijuana for Walsh and Jansen at the cabin in Fauquier County for which Jenkins was to be paid $5.00 a pound. On the day in question, February 26, 1974, Jenkins testified that Jansen and Walsh came out to the cabin and got some of the marijuana out of the cabin and put it in the back of Walsh's vehicle. (Tr. pp. 182-196).

Walsh and Jansen then left the cabin and proceeded to a clearing in the woods at the end of a dirt road off of the main highway where they met with Samuel Leo Truluck driving another vehicle. Shortly after this meeting, Truluck was arrested at a location in Fauquier County and was found to be in possession of two large boxes of marijuana, approximately eighty pounds in all, containing the controlled drug tetrohydrocannabinols, or THC. These boxes containing the marijuana also had on the outside the fingerprints of the defendant, and were determined by the jury to be the same boxes that had previously been in the log cabin earlier in the day and that had been removed from the cabin by Walsh and Jansen and transferred to Truluck. (Tr. pp. 106-115).

ARGUMENT

The Commonwealth submits that the issue raised by the defendant in his petition for certiorari is a moot issue that does not need to be reached or decided by this Court at this

time. The marijuana which was the subject of the pretrial motion to suppress, on the grounds of insufficiency of the statement of time in the affidavit, was marijuana which was seized from the log cabin, referred to in the statement of the case above, pursuant to a search warrant of that cabin executed after the arrest of Truluck and the seizure of the marijuana from his car. Although the state trial court did not suppress the marijuana seized from the cabin, pursuant to the defendant's pretrial motion to suppress, the state trial court did exclude that evidence from consideration by the jury, at trial, on the grounds that the Commonwealth had not shown a sufficient connection between the defendant and the marijuana found at the cabin. Therefore, the evidence in question was excluded from the jury, which had the same effect as if it had been suppressed pursuant to the pretrial motion to suppress on the grounds of insufficiency of the affidavit.

The Commonwealth submits, therefore, that any error that may have been committed by the state trial court in not granting the pretrial motion to suppress ultimately became harmless error in that said evidence was not allowed to go to the jury and the jury was specifically prohibited from considering that evidence. *Chapman* v. *California,* 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967); *Harrington* v. *California,* 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969).

The mere finding of error in the failure to set forth time in the affidavit, if that was in fact error, does not automatically require the reversal of the defendant's conviction. The properly admitted evidence of guilt, including the marijuana seized from Truluck's vehicle, which contained the defendant's fingerprints, is overwhelming of defendant's guilt of possession with intent to distribute that marijuana, and the prejudicial effect of allowing the subsequently excluded

evidence to remain in the courtroom for portions of the trial, in light of the state trial court's cautionary instructions, is so slight by comparison that it is clear beyond a reasonable doubt that the claimed-of error was harmless. *Schneble* v. *Florida,* 405 U.S. 427, 31 L.Ed.2d 340, 92 S.Ct. 1056 (1972).

Not only was the evidence seized from the cabin excluded by the trial court from consideration by the jury which in and of itself makes any denial of a pretrial motion to suppress harmless, the state trial court in addition took various precautions to make sure that the jury properly understood that such evidence was not to be considered. The defendant makes some issue of the fact that this evidence was allowed to be brought into the courtroom and certain testimony elicited about it, prior to its being excluded by the trial court. However, on two different occasions when evidence was brought in in this manner the Court cautioned the jury that the evidence was being presented only for purposes of identification and was not yet to be considered by the jury. On the first such occasion the trial court cautioned the jury that it will be the duty of the court to determine what evidence is admissible or not admissible and that the jury is not to consider evidence until it has been admitted by the trial court. (Tr. p. 71).

On a second occasion, during the course of the trial, when certain evidence was being brought into the courtroom, prior to its actually being admitted as evidence, the judge cautioned the jury as follows:

> "Members of the jury, before this is admissible, before you can consider it, it will have to be connected to the defendant. And of course, you will be instructed fully at a later time that the Court is admitting this as a circumstance that may possibly be considered. It would have to be connected with the defendant before you are entitled to consider in this case." (Tr. pp. 107, 108).

Finally, at the end of the trial, when the trial court determined that the evidence seized from the cabin was not to be admissible and not to be considered by the jury, the trial court took great care to properly instruct the jury on that point as follows:

> "Now, there has been an addition—there has been some evidence that the Commonwealth has attempted to introduce here. And the Court, I believe, indicated that it would rule on whether this was admissible. The Court has held that all of the boxes that were presented here, that were seized at the cabin of one Thomas Jenkins is not to be considered as such.
>
> "Now, I would direct you, members of the jury, not to consider that as evidence in the case. There were two boxes that were seized in the car according to the evidence that was taken from the car of one Samuel Leo Trulox, [sic] that evidence has been admitted into evidence. And those two boxes, along with the tape recording are admitted in evidence. I believe they are the only exhibits in evidence; isn't that correct? . . . All right. They are the only exhibits that you are to consider. Of course, you are to consider all of the testimony that you have heard from the witness stand that the Court has admitted.
>
> "You are not to be concerned with the rulings of the Court on the evidence. Insofar as counsel is concerned, you are not to hold the rulings of the Court against either counsel. It is of course the duty of the counsel to object to any evidence that it considers to be inadmissible, and the duty of the Court to determine what evidence should be considered. So I will instruct you to consider only the evidence that is before you, that the Court has admitted."

The Commonwealth therefore submits that not only was the evidence, which is the subject of the objection of the defendant herein, not admitted into evidence, for grounds

other than those raised in defendant's pretrial motion to suppress, but the jury was fully and properly instructed that it was not to consider the evidence seized from the cabin, and therefore there is no question whatsoever that any error that may have been committed in not granting the pretrial motion to suppress was in fact harmless error. The defendant was properly convicted of possession with intent to distribute tetrohydrocannabinols, an ingredient contained in marijuana, and in excess of eighty pounds of such marijuana was admitted into evidence, which marijuana was seized from the vehicle of Samuel Leo Truluck, containing the fingerprints of the defendant, after having previously been in the cabin where it was being stored by Jenkins on behalf of the defendant. None of this finding of guilt by the jury required the introduction into evidence of the marijuana which was seized from the cabin and which was eventually excluded from evidence.

The Commonwealth submits in fact that the only issue really before this Court, as a result of the defendant's petition for a writ of certiorari, is in fact an objection on the part of the petitioner to the fact that the trial court did not grant him a mistrial, after having allowed the evidence seized from the log cabin to be brought into the courtroom on occasion and exhibited to the jury as being the subject of the testimony of some of the police officers involved, prior to its being excluded from evidence. Respondent submits that the granting of a mistrial under such circumstances is in fact a matter within the sound discretion of the trial court and is not a matter raising an issue of federal constitutional magnitude, and therefore is not the proper subject of a petition for a writ of certiorari.

Although the Commonwealth does not believe that the Court herein should or can reach the merits of the question concerning the sufficiency of the affidavit for the search

warrant, for the reasons set forth above, the Commonwealth is not in any way admitting that the affidavit for the search warrant was in fact invalid for failure to set forth specifically the time when the various instances set forth therein occurred. As a general rule, the cases appear to be unanimous that an affidavit must contain a statement as to the time when the facts relied upon occurred. 100 A.L.R.2d 525. The purpose of this statement of time is to establish a reasonable belief that the same conditions described in the affidavit still prevail at the time of the issuance of the search warrant. Since an affidavit must contain a statement of time, the real question is what is considered a sufficient statement of time.

A simple reading of the affidavit in the instant case clearly reveals that no specific date is set forth therein. The mere lack of a specific date, however, is not fatal, when the time reference of the facts constituting probable cause is sufficiently established in some other fashion in the affidavit. In the affidavit in the instant case, the only word used to suggest a time frame is the word "currently." The issue, then, is whether an affidavit couched in the language of *currently* is a sufficient statement of time for the purpose of an affidavit.

In *Reynolds* v. *State,* 238 So.2d 557 (Ala. 1970), it was held that an affidavit can be said to establish the necessary time element when the word "recently," when connected with the other language in the affidavit, establishes probable cause. Such a rule as established in *Reynolds,* that "recently," coupled with other language of the affidavit, can be a sufficient statement of time on which probable cause can be found would appear to be valid reasoning in the instant case. The word *currently* is sufficiently similar to the word *recently.* The word *currently* seems to connote a more recent point in time than the word *recently. Currently* has been defined to mean "now." *Webster's New World Dictionary,*

College Edition (1966). In the instant case the word *currently* coupled with the other language in the affidavit shows that the circumstances referred to in the affidavit have gone on and were going on at the time in which the affidavit was being sworn to.

Furthermore, in reading affidavits for search warrants, this Court has stated that they may be interpreted and read in a common sense fashion, rather than in technical terms. *United States* v. *Ventresca,* 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965). Furthermore, the magistrate can rely on a law enforcement officer's knowledge of the person against whom the search warrant is directed. *United States* v. *Harris,* 403 U.S. 573, 29 L.Ed.2d 723, 91 S.Ct. 2075 (1971) (plurality opinion). Under these guidelines, the affidavit in the instant case, which concededly does not go into any detail as to the current time situation, can be read in this fashion: that the events recited in the affidavit, of which the affiant-officer had personal knowledge, happened in the most recent period of time, and that the affiant-officer's conclusionary remark as to his belief that the marijuana is currently present is based on his experience as a law enforcement officer and his knowledge of the nature of the distribution of marijuana.

The Commonwealth submits therefore that the affidavit for the search warrant in the instant case was valid and did sufficiently apprise the magistrate that the facts recited therein were current and led up to a current and existing situation, and therefore the defendant's motion to suppress the evidence seized at the cabin was not well-taken.

CONCLUSION

For the reasons set out herein, it is submitted that no error was committed by the state trial court in refusing to suppress the evidence seized at the cabin, prior to the trial, since

such evidence was subsequently excluded from consideration by the jury and therefore no error was committed in not previously suppressing that evidence. It is further submitted that the affidavit in question was not insufficient for failure to set forth necessary time requirements. And it is further submitted that the issues raised by the petitioner herein are not only moot but do not raise an issue of constitutional magnitude. For these reasons the Commonwealth submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on or before the 20th day of February, 1976, I mailed three copies of the foregoing brief to Lowry J. Miller, Esq., counsel for the petitioner, Miller, Miller, Patterson & Reese, 2701 North Pershing Drive, Arlington, Virginia 22201.

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